

BOOK REVIEW

CODICE EUROPEO DEI CONTRATTI, LIBRO SECONDO [DEI CONTRATTI DI SERVIZI]. Giuseppe Gandolfi, Coordinatore. Edizione Italiana, Milano (Dott A. Giuffrè ed., Accademia dei Giusprivatisti Europei 2014). 346 pp.

Reviewed by Shael Herman*

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I. INTRODUCTION

Like our biblical progenitor, Adam, and the celebrated botanist, Linnaeus, Roman jurists forged in our collective imagination links between taxonomy and destiny. No idle frolic, a comprehensive nomenclature was seen as conducive to man’s stewardship of nature and government alike. In classical Roman law, taxonomies channeled jurists’ contractual analysis. Featuring distinctive elements, Romanesque nominate contracts were typically enforceable by specialized nominate actions.¹ To this day, continental lawyers, like their Roman forebears,

* © 2017 Shael Herman. Professor Emeritus, Tulane University; Member of the Academy of European Private Lawyers, Pavia, Brookline, Massachusetts. Email: shaelherman@comcast.net.

1. E.g., *actio empti* (buyer’s action), *actio venditi* (seller’s action), *actio mandati directa* (mandate enforcement), *actio conductio* (enforcement of lease). According to the Project’s Comments on *Deposito*, the praetor recognized a specialized action against a depository who had

have been schooled to rank nominate contracts (e.g., *emptio venditio*) above their innominate counterparts. A badge of its subsidiarity, an innominate contract's exclusion from a particularized regime placed it outside a comprehensive taxonomy. The innominate contract, unlike its nominate counterparts, was not at its conclusion fully executory for both parties; one party had to render his performance before becoming entitled to demand his contracting partner's performance.²

As attested by the volume under review (hereinafter sometimes *Projet*), contractual taxonomies have endured in European legal imaginations. Characteristic of modern European codifications, a scheme of nominate contracts has informed the architecture of this *Projet*. A product of a multi-year collaboration of the Academy of European Private Lawyers (Milan & Pavia), the *Projet* aligns modern norms for "service contracts" with the European Union's relevant regulations. The work has been enriched by comparative insights of European jurists, under the leadership of Professor Giuseppe Gandolfi (Milan & Pavia). These contracts, according to Professor Gandolfi, feature a dominant obligation to do something, rather than to give or transfer something (e.g., sale). For example, chapter 2 regulates mandate (*mandatum*; agency); there follow regulations of transport contracts, construction contracts, services of liberal professions, deposit, construction (*appalto*) and so forth.

According to the volume's preface, European lawyers have long deemed the harmonization of European contract rules essential for the common market's efficient functioning. This harmonization, unrealized since the foundation of the Union, has grown increasingly complicated amid a babel of languages and legal traditions of a burgeoning organization. Obstacles to harmonization run deep; from one member state to another, cultural differences produce discontinuities, suggesting that in each state, jurists are prisoners of their national doctrine, legislation, and jurisprudence. This phenomenon has been an inevitable by-product of autonomous nation states, each traveling its own path.

failed to return an item confided to him. CODICE EUROPEO DEI CONTRATTI, LIBRO SECONDO at 229.

2. For the evolution and enforcement of innominate contracts, see generally REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 533-37 (1996). The Digest enumerated four general classes of innominate contracts: D 19.5.5 "*do tibi ut des; aut do ut facias; aut facio ut des; aut facio ut facias.*" (I give to you in order that you give me; I give in order that you do; I do so that you give; I do so that you do) These flexible formulae enabled parties to recover the expectation interest of an agreement. Thus, enforcement of an exchange (*permutation*) became akin to *emptio venditio*. But a party who rendered his performance of an innominate contract could also recover the performance via a *condictio causa data causa non secuta*. ZIMMERMANN, *supra* at 536.

Though conducive to harmonization, the exercise of approximating legal concepts and terms of art is complicated even when lawyers originating in different nation states can be coaxed into comparing their professional experiences. Prisoners of their respective languages, the jurists are also sometimes trapped intellectually in contrasting assumptions about the nature of law and lawmaking. A traditional English perspective presents the contrasts in sharp relief. Unlike their continental counterparts, English lawyers, as sentries and guardians for powerful and wealthy clients,³ believe that their ideal contract law is secreted in cases *ambulando solvitur*; the question “what did we do last time” enjoys priority over the question “what should we do this time?” Common law contract doctrine has been spawned by judicial rulings that lock away legal rules and conceptions in particular cases.

In criticizing a code because it cannot resolve all conceivable disputes, English lawyers have traditionally tended to dismiss the codification enterprise as a costly waste of time. Some may see in codification a threat to clients who seek results on their terms. Still others, without reflecting upon virtues of harmonization, have decided against tampering with their good fortune. Some have invoked Max Weber’s pro-codification studies against him, arguing that

civilian codes attracted . . . academic lawyers who constantly sought to polish and refine their internally coherent systems. This push toward consistency in the civil codes was made at the expense of rapid response to situations as they occurred in real time. . . . [I]t is not surprising that academics [read: impractical idealists]⁴ took the principal role in

3. These networks have been well documented. Besides a broad domestic market, U.S. law firms also have the advantage of long ties with global investment bank clients. Several global investment banks that engage in capital market deals are headquartered in the United States. Mutually beneficial connections between law firms and the investment banks go back more than one hundred years. And strangely, despite the lawyer-client relationship undergoing the change from one-stop shop to transactional relations in recent years, these particular ties have endured. John Flood, *Institutional Bridging: How Large Law Firms Engage in Globalization*, 36 B.C. INT’L & COMP. L. REV. 1087, 1090 (May 2013).

4. This point is also made in *id.*:

Unlike the civilian codes, the common law system was piecemeal and ad hoc, with no desire to be polished to some pristine state. It was content to be rough, as were its practitioners who, although they did not entirely scorn the academy, frequently had degrees in subjects other than law. The common law lawyers were trained through apprenticeship and by learning on the job. Law was a craft skill, not a theoretical pursuit for philosophers. As Max Weber put it:

“Not only was systematic and comprehensive treatment of the whole body of the law prevented by the craft-like specialization of the lawyers, but legal practice did not aim at all at a rational system but rather at a practically useful scheme of contracts and actions, oriented towards the interests of clients in typically recurrent situations.”

producing the future generations of lawyers, imbuing in them a reverence for the sanctity of the code above all else.⁵

Whatever the causes of English jurists' allergies to codification, few can read the continental languages in which civil laws have been written; this has put most legal systems outside English readers' comfort zone. Among prominent languages, English is perhaps the least hospitable to civil law norms.

II. THE IMPLICATIONS OF "BREXIT"

Transformed on June 23, 2016, into a triumphant "Brexitteer," (British exit from the EU), a Euro-skeptical English lawyer will more than ever resist overarching European regulation and linguistic approximations because these projects represent creeping Europeanization. In most instances, his law practice will have thrived without extra-linguistic effort. For he will likely be assisted in a trans-border transaction by English language documents reinforced by contractual selection of English law in an Anglophone tribunal or forum. Despite their inherent good sense, non-English laws may be contractually disclaimed, freeing the lawyer from foreign law distractions while his co-contracting parties spend their time and their clients' money in translating deal terms and laws in the midst of negotiating the transactions.

Though well aware of these practical benefits, English lawyers typically couch avoidance of foreign law in the rhetoric of self-congratulation. An English chancellor has argued recently:

Our common law of contract is now a world-wide commodity. It has become so because *it is a system that people [read: Anglophones] like*. In ever more complex, sophisticated and inter-related markets, English commercial law provides predictability of outcome, legal certainty and fairness. It is clear and is built upon well-founded principles, such as the ability to require exact performance and the absence of any general duty of good faith.⁶

I am unaware of reliable support for the chancellor's claims of his law's superiority, and doubt that studies could be designed to assess English law's avowed virtues. With the phrase "people like the system," the chancellor waved away perhaps 75% of all national laws, even though

5. *Id.* at 1095.

6. Lord Falconer of Thoroton, Constitutional Affairs Sec'y & Lord Chancellor, Keynote Address at the KPMG Annual Law Lecture: International Opportunities, London (Jan. 26, 2006), <http://www.dca.gov.uk/speeches/2006/sp060126.htm>.

frequently those people are linguistically unequipped to try others. As a scholar recently argued, the global law firm's main alliance typically enjoys an Anglo-American nexus, an alloy of neo-liberal democracy and respect for property rights. The firm incorporates local norms into an overarching pattern devised in U.K. and U.S. law.

The dominance of English means that lawyers of many nations whose first language is not English routinely work in English as a second language. Opening English lawyers' opportunities across much of northern Europe, this English tendency has reinforced English lawyers' retention of their own lexicons, conceptual apparatus, and downloadable form documents pretty much devoid of foreign legal expressions. Lest readers doubt the power of this English tendency, Professor Von Bar, a distinguished German professor, undertook a project for a European civil code with European Union funds and justified preparing the work in English, even though English resists continental legal equivalents. For decades, English lawyers, despite their "uncontinental" perspectives, have been dominant in the EU. This dominance has obtained even though Great Britain never adopted the Euro. After the Brexit vote in June 2016, Prime Minister Teresa May seems intent on making a virtue of historical necessity; she has breathtakingly sought to assure that British withdrawal from the European Union will not jeopardize U.K. companies' dominance over business in the common market.

III. THE ENGLISH JUGGERNAUT

Since World War II, the English juggernaut has gained momentum. This phenomenon has been reinforced by an Anglo-American exceptionalism animated by the allies' victory in World War II. According to Ian Buruma, "the defeat of Germany and Japan resulted in a grand alliance, led by the United States, in the West and Asia. Pax Americana, along with a unified Europe, would keep the democratic world safe."⁷ Japan, in many respects a client state in the war's aftermath, received from the United States a new constitutional order. West Germany, in similar post-war tutelage, hosted armies of allied troops who were to guarantee the nation against Russian mischief. (Germany still hosts about 50,000 U.S. soldiers, and the number of troops in Germany and easternmost NATO states will likely rise in response to Vladimir Putin's saber rattling.)

7. Ian Buruma, *The End of the Anglo American Order*, N.Y. TIMES MAG., Nov. 29, 2016.

American and English legal importations arrived in English language trappings. European lawyers increasingly have had to learn English. Meanwhile, many American universities have dropped foreign language requirements altogether. The hegemony of American law was reinforced by the lack of a foreign language requirement in United States law schools. As a result, American law students frequently declare their intention to practice international law, although English is their only language.

As two comparative scholars have recently remarked, “the reputation of legal scholarship is greatly enhanced if the scholar makes some [if not most] of his work available in English,”⁸ confirming that English readers interested in foreign law infrequently read law in other languages. English lawyers enjoy significant intellectual support from their American counterparts. Judges across the Atlantic seem allergic enough to foreign laws, never mind foreign languages, to have prompted a leading supreme court justice, Stephen Breyer, to have published recently *The Court and the World: American Law and the New Global Realities*. There he criticized at length his judicial brethren’s common practice of systematically excluding all foreign law from judicial consideration on the basis that American law alone suffices for their work. Breathtakingly, that common practice, in a nation cobbled together from immigrants, rests on a claim that reference to foreign laws would be undemocratic. One wonders why a judge would feel impelled to shut out foreign laws from his deliberations when his mono-lingualism and isolationism have already shut out the laws so well.

IV. ERUDITION AND SYSTEM

Evocative of a civil code’s general part, the Projet’s first chapter, titled “Disposizione Comuni,” sets out overarching norms that are woven throughout the nominate contracts regulated in the balance of the volume. Recalling the organization of medieval *consilia*, this initial “summa” of norms applies to contracts generally. Recognizing that human experience inevitably outstrips a code drafter’s imagination, the Projet’s common dispositions have been designed to give the code longevity and flexibility, enabling its interpreters to fill inevitable lacunae in practice and jurisprudence. These gap filler provisions are particularly salutary for comprehensive legislation applicable to a multiplicity of municipal

8. B. MARKESINIS & J. FEDTKE, *ENGAGING WITH FOREIGN LAW* 78 (2009). On the inadequacies of comparative law study in English faculties, see *id.* at 22-24. Originating respectively in Greece and Germany, the authors have long taught in English-speaking law faculties.

laws; otherwise, from one locale to the next, lawyers might sacrifice the unity of merchant law by mining their municipal laws for solutions not readily detected within their supranational code.

Characteristic of continental codes, “common dispositions” are generally suppletive, not imperative, in the sense that the parties by agreement may derogate from them (art. 230). The common dispositions ought also to render flexible the analysis of innominate contracts as they arise in practice and adjudication. Deprived of specially tailored rules, innominate contracts depend especially upon general norms.

V. ONEROSITY AND GRATUITOUSNESS

The *Projet* enshrines a diversity of norms that will likely elude jurists who communicate exclusively in English and have had no sustained experience with other laws.⁹ For example, article 234 of the *Projet* evokes distinctive leitmotifs of onerosity and gratuitousness. Presupposing idealized individualistic bargaining parties uninfluenced by sources of gratuitous contracts like courtesy, amity, and honor, English contract analysis is inhospitable to the mentioned leitmotifs. Of course, English law recognizes that gifts may be prompted by generous impulses, but these lie beyond traditional English contract analysis. English doctrine manifests scant interest in gratuitous contracts that figured in the Roman tradition. When English doctrine regulates agreements akin to the Roman gratuitous contracts, the case law routinely characterizes them as bargained exchanges. This tendency toward bargained consideration is intensified where bargain shades into detrimental reliance. In such disputes, the parties have never bargained with one another, and a promisee’s reliance may not have been reasonable; yet a judgment may overcompensate the claimant for his injury, partly because protection of the negative contract interest is poorly understood,¹⁰ and partly because the contractual remedy scheme has an all-or-nothing approach.¹¹ By

9. I trust that readers recognize this statement as an empirical observation, not a disparagement of the contributions of the Academy’s British members. These included Barry Nicholas (Oxford), J. A. Jolowicz (Cambridge), Peter Birks (Oxford), Sir Jack Beatson (High Court, London), Roy Goode (Oxford), Gareth Jones (Cambridge), Harvey McGregor (Edinburgh), Peter Stein (Cambridge), Lord Alan Rodger of Earlsferry (Supreme Court of the U.K.) and Lord Harry Woolf (Chief Justice, England and Wales). Over the years, their sustained experience with other laws equipped them to work mightily to bridge gaps between English law and continental laws.

10. The introduction to Roderick Munday’s recent treatise on Agency identifies vagaries of consideration doctrine in English contracts analogous to the Roman gratuitous contracts: R. MUNDAY, *AGENCY: LAW AND PRINCIPLES* 36-38 (2010).

11. “At the height of the classical period the Courts seem to have thought that they could only protect reliance interests by protecting expectation interests. . . . What was evidently

contrast, the Projet, while recognizing “mere courtesy” as a valid basis of an obligation and the promisee’s reliance thereon, limits recovery for his injury [Negativ Interesse]¹² to equitable compensation:

If a promise of a performance stemming from gratuitousness and mere courtesy remains unexecuted, the promisee may obtain equitable reparation of the harm he has suffered, subject to the following conditions: the promise was made in writing in unequivocal terms, . . . or it was accompanied by receiving on an amicable basis a sum representing partial reimbursement of expenses, or there was commencement of its execution. But in these cases the reparation is excluded if the promisor has forewarned the promisee of the inexecution, or given him a means of adopting a different solution. (Projet, p. 7, art. 235)

Comments accompanying this provision locate its inspiration in *affectionis vel benevolentiae causa*, a brocard redolent with social solidarity and familiar in Italian labor law. Surprisingly, at least for an English jurist, the Projet would recognize an impulse of solidarity in a contract of “trasporto.” Article 235, as we learn, contemplates damages from a *non-performance* triggered by an amicable promise or “mere courtesy,” not tangible damage arising from a courtesy-driven performance regulated by Aquilian liability. (Projet, p. 118) This damage remedy resonates in Justinian’s Digest, which recounts instructive examples of reimbursement of expenses and damages resulting from a promisee’s reliance on a gift promise. For example, a promisor gratuitously promised a friend a sum of money if he took a trip. After the promisee had taken the trip, the promisor sued for recovery of the money he had meanwhile advanced him. Although the promisee received a deduction for his expenditures from the payor’s recovery of the money, he was denied damages in excess of that sum.¹³

missing in the mid-nineteenth century was the idea that reliance could be protected on its own, without also protecting expectations.” P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 461 (1979).

12. A relying promisee, according to German doctrine, is said to be entitled to be placed in the position he would be in, had he not relied on the existence of the contract, and therefore to recover only the cost incurred in anticipation of the performance of the contract, and possibly the lost opportunity of entering another favourable contract he could have concluded had he not placed his reliance upon the valid conclusion of the first contract. On the negative and positive contract interests, see generally ZIMMERMANN, *supra* note 2, at 243-44.

13. JOHN P DAWSON, *GIFTS AND PROMISES* 188-89 (1980), *analyzed in* Shael Herman, *Detrimental Reliance in Louisiana Law—Past, Present and Future: The Code Drafter’s Perspective*, 58 *TUL. L. REV.* 707 (1984).

VI. GRATUITOUS ROMAN CONTRACTS

Roman jurists posited two different realms of contractual relations. In a gratuitous realm lay affective relationships with family, friends, and clients; the onerous realm, in contrast, was associated with hard-bargaining, utilitarian, profit-maximizing rational market actors. Limited to the second realm, the English contract taxonomy could not conveniently accommodate gratuitous contracts.¹⁴ Gratuitous contracts such as *commodatum* (loan for use), *mutuum* (loan for consumption), *depositum*, and *pignus* (pledge) were suffused by a Roman citizen's honor and dignity, not egotistical hard bargaining. Without expectation of recompense, the citizen rendered all sorts of services for friends, relatives, and liberti in his patronate. In addition to the mentioned contracts, the citizen might also become surety for a friend's loan, in token of which his binding signature was called an accommodation.

VII. ONEROSITY AND GRATUITOUSNESS IN TRUST

Realms of onerosity and gratuitousness figure in the drafters' conceptualization of a trust as a dual patrimony (Italian: *patrimonio separato ed autonomo*). The Projet's trust provisions will likely surprise English jurists who have misunderstood F. W. Maitland's boast about the distinctively English character of the institution.¹⁵ The Projet's characterization of a trust as an onerous or gratuitous contract would

14. Occasionally an uncommonly "civilian" English judge steeped in Roman law could recite the taxonomy of nominate contracts with the best of continental civilians. Distinctions between gratuitousness and onerosity did not faze Holt, C J, who declared in *Coggs v Bernard*,

[T]here are six sorts of bailments. The first is a bare naked bailment of goods delivered by one man to the other to keep for the use of the bailor; this I call a *depositum*. The second sort when chattels are lent to a friend gratis, to be used by him. This is *commodatum* because the things are to be restored in specie. The third sort . . . goods are left with the bailee to be used by him for hire; this is *locatio et conductio* . . . the lender is called locator, the borrower is called conductor; the fourth, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor and in English a pawn or a pledge; this is called in Latin *vadum*, in English a pawn or pledge [probably *pignus*?].

Coggs v. Bernard, 91 E.R. 25 (1703), reproduced in David Ibbetson, *Coggs v Barnard*, in C. MITCHELL & P. MITCHELL, *LANDMARK CASES IN THE LAW OF CONTRACT* (2008). Lord Holt's argued that a contract for the carriage and delivery of chattels could be gratis, a view in contrast with the traditional English requirement for a contract of a bargained exchange.

15. "[The trust] perhaps forms the most distinctive achievement of English lawyers . . . [T]here is nothing quite like it in foreign law." F.W. MAITLAND, *EQUITY: ALSO THE FORMS OF ACTION AT COMMON LAW* 23 (A.H. Chaytor & W.J. Whittaker eds., 1984). For iterations of the trust in multiple guises, see Shael Herman, *Utilitas Ecclesiae Versus Radix Malorum: The Moral Paradox of Ecclesiastical Patrimony*, 73 TUL. L. REV. 1231 (Mar. 1999).

likely also puzzle English lawyers wedded to the idea of a trust as a *sui generis* institution. (art. 237)¹⁶

VIII. GRATUITOUS DIMENSION OF *DEPOSITO* AND *TRANSPORTO*

Also resonating in the realm of amicable relations, deposit, according to Professor Gandolfi (p. 230) originated in the Roman matrix of gratuitousness, because “it . . . [stemmed from] mere courtesy.” The comments on *Deposito* constitute a minor rhapsody on Roman law. Noting an indebtedness to Justinian’s compilation, the commentator highlighted links between *depositum* and *tutela* in the Twelve Tables and the *actio furti*. These remarks would likely resonate for English lawyers familiar with previously-cited English jurisprudence of bailments framed in a Roman taxonomy.¹⁷

Strikingly, *trasporto* (carriage) can also be either gratuitous or onerous; even in a gratuitous form, a carrier may incur significant liabilities. Meanwhile, the concept of gratuitousness in this agreement may baffle English lawyers who are accustomed to gauging risk and reward in terms of degree of onerosity and price. Professor Gandolfi has supplied a Queen’s Bench case involving a contract of transport where the court struggled with onerosity and gratuitousness, though not price. (Projet, p. 118)

IX. THE NEGATIVE INTEREST

Like drafting a contract for services, codifying regulations for such services regularly challenges lawyers to conceptualize prospective human behavior at an ideal point between the concrete and the abstract. The challenge appears especially for the abrupt resolution of a contract through neither party’s fault. If the contracted work lies unfinished, the contractor, without contractual remedies for the circumstance, may ask whether to continue the project beyond the other party’s notice of cancellation, hoping for the best in protecting his interest. Meanwhile,

16. (“Il rapporto e a titolo oneroso. Può essere a titolo gratuito se ciò è espressamente previsto nel contratto e soltanto per scopi di natura filantropica . . .”) Project, art. 237, ¶7. Gandolfi highlights the dissonance between the Projet’s conception of the trust and that of English lawyers.

In the view of a continental jurist, that is one to the east of the English Channel, the trust, . . . constitutes a sort of burden based not on contractual links, but on the fiducia; the settlor transfers without counter-prestation the property to the trustee of the assets, that remain separate from the latter’s other assets, to whom the settlor confides an interest of a third party, the beneficiary.

17. *Coggs v. Bernard*, *supra* note 14.

the owner, as the other party to the contract, may wonder how best to mitigate his damages and salvage the project. Long a vexing problem for lawyers and clients alike, if the contract is found ineffective after commencement of performance, then typically the provisions on remedies will collapse along with the rest of the contract. Perhaps the lawyer, having yielded to the client's anxieties, failed to prescribe relief on the contract's collapse for good cause. For such a situation, the *Projet* provides: "The performing party has a right to recede from the contract for just cause, but absent objective impossibility, he should not suspend his performance if it will injure the client unless an adequate substitute [worker] can be found." (*Projet*, art. 281.7, pp. 78-79)

Addressing the collapse of a contract negotiated by a commercial agent, another provision evokes a version of the venerable doctrine *colpa in contrahendo*. The provision supposes a broker's contract to be invalid for reasons of which he was unaware. But the broker is nevertheless entitled to his commission. If the condition is suspensive, the compensation is owed on fulfillment of the condition. The judge may also reduce the commission equitably if he finds it unduly elevated.¹⁸

X. CODA

At this writing (January 1, 2017), as more than a million middle eastern refugees fuel European nationalism by seeking resettlement in Europe, harmonization of laws is likely among the European Union's lowest priorities. Economic questions top the list of Union concerns. The Euro's value has been volatile; unemployment rates are staggering in some nations; and there is no sufficiently powerful central banking mechanism to alleviate frictions among the states. Recent economic crises in Greece and Spain have roiled European institutions. Prompted by Brexit, British officials have moved to sever England's links with the European Union and avoid a further influx of European citizens. Meanwhile, right wing political movements elsewhere in Europe further threaten the Union's solidarity.

Even were European politics placid, prospects of adopting a code of contracts seem discouraging. As an outsider in the sense that I am the solitary active United States member of the Academy of European

18. The policy of this provision resonates in article 197 of the Uniform Act of OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires). The provision grants an equitable compensatory allowance on the abrupt rupture of the principal's relationship with a commercial agent. EUROPEAN CONTRACT LAW: MATERIALS FOR A COMMON FRAME OF REFERENCE—TERMINOLOGY, GUIDING PRINCIPLES, MODEL RULES 288 (B. Fauvarque-Cosson & Denis Mazeaud eds., 2008).

Private Lawyers, Pavia, I wonder if the time will ever be right for such an adoption. Meanwhile, legal harmonization is a protean target. Where courageous European political champions are needed, the current leaders at the Union level appear diffident in face of major projects like codification and harmonization. By definition comprehensive regulation, a code meets resistance from a fanciful conception of the world as a market in which massively wealthy corporate actors invisibly pull strings in their own interests, and claim that they are acting for benefit of the polity as a whole. European officials seem to heed corporate representatives who decry regulation in a spirit antagonistic to comprehensive code regulation. English is the vessel for what seems to pass for economic law. Self-satisfied with solving complex problems through cases, i.e., *ambulando solvitur*, Anglo-American lawyers have traditionally opposed codifications. English legal lexicons are not attuned to key terms and concepts of the Romanesque tradition. Making a virtue of necessity, a scholar, seeming to display little self awareness, argued recently that “Anglo-American jurisprudence was unfettered and not beholden to law as an idealistic form.”¹⁹ One wonders whether the writer would have included constitutional jurisprudence in this generalization.

In the European Union, customary rules are sometimes characterized as soft law. The European Community Treaty has explicitly promoted soft (non legislated) laws as part of the European Union’s open method of coordination. Soft law in the Union now receives book length treatment.²⁰ For inspiration, proponents of European codification can look to America. Here, the bulk of American contract regulation is not legislated law, strictly speaking; indeed much of it is “soft” law, consisting of jurisprudence, restatements, and model laws. The Uniform Commercial Code itself is not a national code, but rather fifty state codes, each one surprisingly restricted in comparison with the great European codifications. In a typical transaction, the parties choose as an applicable law a particular state’s law, excluding its choice-of-law norms. If European commercial lawyers followed this American practice, then the Gandolfi projet, as soft law, would have a reasonable chance of application one transaction at a time. But the code will become a dead letter if it is contractually disclaimed by the parties’ lawyers, although regrettably they may never have read the elegant law before surrendering it. As a member of the Academy, I believe that the Academy’s spirit, and

19. Flood, *supra* note 3, at 1092.

20. L. SENDEN, *SOFT LAW IN THE EUROPEAN COMMUNITY* (2004).

in particular that of its British members and Professor Gandolfi, can guide European Union institutions toward adoption of the code as soft law. By sidestepping the soft law issue altogether, the adoption of the code as supranational legislation enjoys the best chance of promoting the Union's avowed harmonization goals.